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IN THE
SUPREME COURT OF THE UNITED STATES

IRWIN J. CAMPBELL, J. C. LAWYER, BACKUS FERGUSON, AND THOMAS HANAHAN, III,
PETITIONERS,

V.

HILTON HEAD NO. 1 PUBLIC SERVICE DISTRICT AND BEAUFORT COUNTY, SOUTH CAROLINA,
RESPONDENTS.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY PETITION FOR CERTIORARI

1. Should this Court undertake certiorari review, in order to make a pronouncement on the issue of the justiciability in State courts of claims invoking the Republican Guarantee Clause (U.S. Const., art. IV, § 4) through 42 U.S.C. § 1983, in the present case in which that issue has not been argued or briefed by any party, and was not ruled on by the State court below?

2. Should this Court undertake certiorari review, under the Republican Guarantee Clause, of a State statute that was repealed five years ago because of an infirmity under its own State constitution, in order to make a pronouncement as to:

    a. Whether the Republican Guarantee Clause requires some specific level of direct elective representation in the body authorized under State law to impose a limited property tax for purposes of defraying the cost of providing water and sewer service?

    b. Whether, if so, the level of direct and indirect representation afforded to the tax-paying property owners of Respondent Hilton Head No. 1 Public Service District (the "District") fell short of that requirement?

    c. Whether, if it did fall short, the necessary remedy would require increasing taxes and/or other charges on various subsets of the people who had paid the allegedly improper tax, in order to refund the taxes to themselves and/or other subsets of the people who had paid the allegedly improper tax?

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ADDITIONAL OPINIONS BELOW

In addition to the State court opinions cited in the "Opinions Below" section of the Petition For Writ of Certiorari, there have been two federal court orders in this case (referenced in the "Statement" section of the Petition). They are *Campbell v. Hilton Head No. 1 Public Service District*, 114 F.Supp.2d 482 (D.S.C. 1999), and *Lawyer v. Hilton Head Public Service District No. 1*, 220 F.3d 298 (4th Cir. 2000), which affirmed the District Court opinion to the effect that the plaintiffs'/Petitioners' lawsuit in federal court was barred by the Tax Injunction Act, 28 U.S.C. § 1341 and the comity doctrine, in light of the fact that adequate review of plaintiffs'/Petitioners' claims were available in State court.

ADDITIONAL STATUTE INVOLVED

This case centers on the constitutionality under the federal Republican Guarantee Clause of a South Carolina statutory provision that was repealed over five years ago. That statute directly authorized a particular governing body of a South Carolina political subdivision to participate in the determination of a property tax levy. The Petitioners seek a ruling that such authorization, and hence the statutory provision containing it, violated the Republican Guarantee Clause and that they are entitled to a refund of taxes collected under that statutory provision in the years prior to its repeal.

The statute, ACT NO. 596, 1969 S.C ACTS 1036 (the "Enabling Act"), created the Respondent District to provide water and sewer service to an area of Hilton Head Island, that, according to the legislative findings in Section 1 of the

Enabling Act, was experiencing rapid growth and development.

The pertinent text of the Enabling Act, as it relates to the makeup of the governing commission, the levy of taxes, and the financial accountability of the District, is set forth in Appendix A hereto.

In *Weaver v. Richland County Recreation District*, 328 S.C. 83, 492 S.E.2d 79 (S.C. 1997), the South Carolina Supreme Court ruled that participation, by a political subdivision's governing commisson that is constituted in the manner set out in Section 3 of the Enabling Act, in a taxing mechanism such as that found in Section 4.17 of the Enabling Act, was contrary to the explicit language of S.C. Const. art. X, § 5. Following that decision, the South Carolina legislature (the "General Assembly") replaced the offending Section 4.17 with a tax imposed directly by the elected General Assembly.[1] As noted in the Petition, the Petitioners are not challenging the new statute or its taxing mechanism. Pet. at 4.

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[1] The *Weaver* decision was rendered on October 13, 1997. As noted in the Petition (Pet. at 3), *Weaver* recognized the likely financial disruption to local governments constituted like the Richland County Recreation District or the Respondent District here, and gave the General Assembly until December 31, 1999 (*i.e.*, two annual legislative sessions), to correct the problem. The General Assembly did correct the problem at its very next legislative session, by enacting ACT NO. 397, 1998 S.C. ACTS 2389 on June 10, 1998, now codified at S.C. CODE § 6-11-271.

STATEMENT

The "Statement" set forth in the Petition is generally accurate, except as noted below.

I. The most important omission in Petitioners' "Statement" is its failure to state "when the federal questions sought to be reviewed were raised" and "the method or manner of raising them," as required by this Court's Rules, Sup. Ct. R. 14.1(g)(i).

A. The primary issue raised by the Petitioners for this Court's review is the question of the justiciability in State courts of individual claims arising under the Republican Guarantee Clause through 42 U.S.C. § 1983. That question has not been raised, briefed or argued by any party in this case. The only mention of justiciability to date in this case (other than now the Petition) was in the final footnote of the opinion of the South Carolina Supreme Court. That footnote simply noted that the law relating to justiciability has some open questions. The South Carolina Supreme Court did not attempt to analyze or rule on those open questions. Instead, it had made those questions irrelevant to this case by having proceeded directly to the merits and having found that, regardless of justiciability, there was no meritorious claim involved.

B. The secondary issue raised by Petitioners, going to the merits of the case, is whether the Republican Guarantee Clause imposes a requirement that the governing bodies of tax-imposing political

subdivisions must afford some particular level of elective representation, and if so what that level would be. The first mention of the Republican Guarantee Clause in this case was on November 28, 2001, three and one-half years into the case, at the hearing on the plaintiffs'/Petitioners' motion for summary judgment before the State trial court. That mention was made in a quotation from *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987) that was contained in a memorandum delivered at the hearing to the trial judge and to Respondents' counsel by plaintiffs/Petitioners in support of their motion.[2]

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[2] The plaintiffs/Petitioners originally asserted a number of widely disparate claims (ranging from fraud to racial discrimination to self-dealing to unjust enrichment to conversion to violations of the South Carolina Unfair Trade Practices Act to Takings Clause violations to a rate structure contrary to the terms of federal grants, *etc.*). With regard to the District's taxing mechanism, the plaintiffs/Petitioners asserted that the State law violation entitled them to a federal remedy, without identifying any federal right. *See, e.g.*, Opening Brief of Appellants [Petitioners here], before U.S. Court of Appeals for the Fourth Circuit, at pp. 2, 8, 11: dated December 22, 1999, in the proceedings that culminated in the decision cited in the section hereof captioned "Additional Opinions Below." The plaintiffs/Petitioners dismissed their last two other remaining claims at the hearing on summary judgment, at the same time that they first mentioned the Republican Guarantee Clause.

II. The second set of important omissions from the Petitioners' "Statement" relates to their description of the taxing mechanism of which they complain. Rather than acknowledging the extent to which the residents of the District did have representation, both direct and indirect, in that process, the Petitioners simply characterize the process as "taxation without representation," thereby begging one of the primary questions that this Court will have to answer if it accepts the case. The key omissions in the description of the taxing mechanism, as established by the Enabling Act, are as follows.

A. The members of the governing commission must all be "residents of the District." Enabling Act, Section 3. Consequently, they themselves were always subject to whatever taxes they imposed.

B. The taxing power was limited in two ways.

1. The tax rate was capped at 10 mills. Under South Carolina law, 1 mill is 1/1,000th of the assessed value of the taxed property; and the assessed value is a small percentage of appraised fair market value (*e.g.*, 4% for owner-occupied real property). S.C. Const. art. X, § 1(3). Thus, for an owner-occupied home worth $100,000, the annual cap of 10 mills would equal $40.

2. The taxing power could be exercised only for the limited public purpose of the governmental operations of a water and sewer district. Enabling Act, Section 4.17. It was not

available for general governmental purposes outside of the District's mandate.

C. The taxing mechanism, including the limitations on rate and authorized purpose, was authorized by the General Assembly, an elected body that clearly had the power to tax the District directly for its governmental purposes (as in fact it now does under the new taxing mechanism, as to which the Petitioners expressly disclaim any challenge under the federal or South Carolina Constitution). The General Assembly was also regularly apprised of what use was being made of the taxing power (see Enabling Act, Section 8), and had the power (subject, of course, to the usual constraints on its legislative power imposed by the South Carolina Constitution) to step in and modify or eliminate the taxing power of appointed special purpose district commissions (as in fact it did-in response to *Weaver*).

D. The local legislative delegation from Beaufort County (which has the power to nominate members for the District's governing commission (Enabling Act, Section 3)) and the Governor (who has the power to appoint such nominees (*ibid.*)) are both elected officials, in whose elections the residents of the District are fully entitled to participate.

E. The County Auditor and the County Treasurer, who were the officials charged by the Enabling Act with the implementation of the limited tax set by the District's governing commission (Enabling Act, Section 4.17), are elected officials, in whose elections the residents of the District are fully entitled to participate.

REASONS FOR DENYING THE PETITION

The issues raised by Petitioners do not merit certiorari review by this Court.

I. THE QUESTION OF JUSTICIABILITY IS NOT APPROPRIATE FOR CERTIORARI REVIEW IN THIS CASE.

A. Neither the record nor the ruling below has presented the question of justiciability, and that question is therefore not suited for judicial review under the rules and precedents of this Court.

The parties have not raised, addressed, briefed or argued the issue of justiciability at any point in the proceedings below. No court below has yet ruled on the issue of justiciability.

The only mention of justiciability to date in this case was in a concluding, inconsequential footnote of the South Carolina Supreme Court opinion, after all the heavy-lifting of the analysis had been completed. Pet.App. at 9a. That footnote merely acknowledged the existence of some open questions surrounding the concept of justiciability of Republican Guarantee Clause claims. But the South Carolina Supreme Court had made those questions irrelevant to this case by having proceeded directly to the merits and having found that, regardless of justiciability, there was no meritorious claim involved. Consequently, although noting the questions, the South Carolina Supreme Court neither analyzed nor answered them. Rather, it in

essence assumed justiciability *arguendo*, and concluded that plaintiffs/Petitioners had no claim in any event.

Because the State court below did not analyze or rule on this issue, it does not meet any of the usual criteria for evaluating certiorari petitions set out in Sup. Ct. R. 10, each of which criteria requires that "a state court of last resort . . . has decided" the issue for which review is sought. [Emphasis added.]

In cases such as this, where there "was never 'any real contest' upon the point" for which appellate review is sought, this Court has consistently ruled that, "absent the adversarial dispute necessary to apprise the state court of the arguments . . . , we will not decide the question . . . ." *Illinois v. Gates*, 462 U.S. 213, 223 (1983). *See also Adams v. Robertson*, 520 U.S. 83, 88 (1997); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, n. 9 (1987); *Webb v. Webb*, 451 U.S. 493, 500 (1981); *Morrison v. Watson*, 154 U.S. 111, 115 (1894).

Thus, by their Petition, the Petitioners invite this Court to enter and perhaps settle a putative dispute in which the parties here and the several courts below have stood in the role of disinterested observers and non-combatants. This is manifestly not the case for resolving such a dispute.

B. The Petitioners' position on justiciability is not contrary to that assumed by the court below; and the Petitioners therefore have no direct interest in a review of that position. General interest or curiosity is not sufficient to invoke a writ of certiorari.

Because the plaintiffs/Petitioners, by bringing this action, actually sought a ruling on the merits, they are in no way aggrieved by the South Carolina Supreme Court's having accepted justiciability of their claim, even if that acceptance was only *arguendo*. Affirming justiciability would not advance the Petitioners' cause: the merits have already been addressed and ruled upon. Denying justiciability would, obviously, be a distinct, new mortal blow to the Petitioners' cause.

Consequently, rather than asserting any direct interest in this Court's resolution of some or all of the justiciability questions, the Petitioners attempt to leverage a review of justiciability issues (and from there a review of the merits issues) from the interesting nature of justiciability concerns. However:

> A federal question . . . may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional

> dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955), referring to this former Sup. Ct. R. 19, the predecessor to the current Sup. Ct. R. 10.

Moreover, the features of the justiciability landscape that Petitioners find so interesting appear to be not quite so inviting to jurists charged with responsibilities beyond those of litigants. As noted in subsection "C" of this argument below, a number of courts have avoided justicibiality issues by first determining whether there is an otherwise meritorious claim that would warrant the extensive analysis that developing an elaborate justiciability jurisprudence would require. In addition, the Petitioners note that two State supreme courts, Washington and Oregon, "have called upon this Court to further clarify the doctrine of nonjusticiability of Guarantee Clause Claims brought by private parties seeking to challenge state action." Pet. at 17. What the Petition does not note, however, is that certiorari was sought from this Court in each of those two cases, and in each case was denied. *See State v. Manussier*, 921 P.2d 473 (Wash. 1996), *cert. denied* 520 U.S. 1201 (1997); and *State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997), *cert. denied* 522 U.S. 994 (1997).

In any event, regardless of how interesting the questions tied up in justiciability may be, or how important in other cases, justiciability is not now an issue necessary to the proper decision of this case; nor would it become such,

unless this Court were to reverse the South Carolina Supreme Court's decision with respect to the merits.

C. There is no significant conflict between the approach of the South Carolina Supreme Court and other courts that would call for certiorari review.

Far from being some sort of jurisprudential outlier that needs reigning in by this Court in the area of justiciability of Republican Guarantee Clause claims, the South Carolina Supreme Court's approach was entirely consistent with that which the Petitioners attribute to this Court and to other lower courts. The Petitioners include cases from the Second, Fifth, Seventh, Ninth and Tenth Circuit Courts of Appeal in "[a] number of decisions [that] have taken the tack of this Court in [*New York v. United States*, 505 U.S. 144 (1992)]: even while expressing some concerns about justiciability, they have ruled on the merits of the underlying Guarantee Clause claim." Pet. at 12-13. That is exactly what the South Carolina Supreme Court has done here.

II. THE QUESTION OF REPRESENTATIONAL REQUIREMENTS UNDER THE REPUBLICAN GUARANTEE CLAUSE FOR LIMITED WATER-AND-SEWER TAXATION AS AUTHORIZED BY AN ELECTED STATE LEGISLATURE IS NOT APPROPRIATE FOR CERTIORARI REVIEW IN THIS CASE.

A. This issue is not "an important question of federal law" that calls for certiorari review pursuant to Sup. Ct. R. 10.

1. The statute that Petitioners claim offended the Republican Guarantee Clause has been repealed,

making this a classic example of "episodic" and "isolated significance" not appropriate for certiorari review.

As noted earlier, this Court in *Rice v. Sioux City Memorial Park, supra*, stated that questions, however interesting, that are of merely "episodic" importance are not appropriate for certiorari review. 349 U.S. at 74. The offending statute here having been repealed, the question presented by this case is quintessentially episodic and not subject to repetition.

This Court has on several occasions considered the propriety of granting certiorari review in cases remarkably similar to the present one.

In *District of Columbia v. Sweeney*, 310 U.S. 631 (1940), a challenge to a tax in the District of Columbia, this Court rejected a petition for a writ of certiorari, stating succinctly: "Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." That is exactly the situation in the present case.

Also, *Rice v. Sioux City Memorial Park, supra*, although involving interesting and knotty constitutional issues different from those in the present case, was nonetheless very similar to the present case in its procedural dynamics. In *Rice*, the plaintiff challenged on federal constitutional grounds an Iowa State court ruling that rejected her claim for damages. While the case was pending, Iowa's legislature enacted a statute that outlawed

the conduct that she complained of and afforded monetary damage relief to injured parties. The new right to damages, however, was expressly not extended to actions pending at the time of enactment, so that the individual plaintiff then before this Court was without relief. After initially granting certiorari review because of the interesting issues involved, the Court on rehearing dismissed the writ of certiorari as improvidently granted, reasoning as follows.

> This Iowa statute bars the ultimate question presented in this case from again arising in that State.
>
> . . .
>
> Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance. On the one hand, we should hesitate to pass judgment on Iowa for unconstitutional action, were such to be found, when it has already rectified any possible error. On the other hand, we should not unnecessarily discourage such remedial action by possible condonation of this isolated incident. Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

Rice v. Sioux City Memorial Park, *supra*, 349 U.S. at 72, 76-77 (footnote omitted).

> *2. Neither the record nor the Petition point to any other State that utilizes taxing mechanisms like that formerly used by South Carolina in the District; nor do they point out any circumstances that would cause such situations, if they exist, to evade regular judicial review.*

The statute having been repealed, it is clear that the situation complained of will not arise again in South Carolina. Nor is there any indication that it is arising in other States. If such a showing were made, however, there would still be no reason to leap-frog the usual judicial process and make pronouncements in advance of allowing the courts of those States to handle any such issues in the first instance. *See Rice v. Sioux City Memorial Park*, *supra*, 349 U.S. at 76. As noted elsewhere in this brief, the Petitioners have not been able to produce even a single case in which a court invalidated a state or local taxing mechanism as violative of the Republican Guarantee Clause, even though disgruntled taxpayers have had over two centuries to litigate the Republican Guarantee Clause. Clearly this is not a question crying out for ultimate judicial resolution.

B. The decision of the South Carolina Supreme Court was correct on the merits.

The sole question presented to the South Carolina Supreme Court on the Republican Guarantee Clause was: Did the Republican Guarantee Clause of the federal Constitution prohibit the republican and popularly-elected

General Assembly from delegating to the District's commission a limited authority to set an annual property tax rate of up to ten mills for operational purposes, where the members of the commission are drawn from the local populace, nominated by the elected local legislators, and appointed by the elected governor, and where the millage rate thus set is thereupon levied by the elected county auditor and collected by the elected county treasurer, all in the context of performing and financing the State's sovereign police responsibility for health and sanitation in a confined geographical area?

1. The language of the Republican Guarantee Clause compels the decision reached by the South Carolina Supreme Court.

The Petitioners contend that the Republican Guarantee Clause is essentially a private cause of action for an individual seeking to overturn a taxation mechanism created by a State's elected legislature. The clear language of the provision rejects that position. It is, after all, a guarantee to the States. It does not deny authority to a State's elected republican governmental institutions, such as the General Assembly, the ability to order that State's affairs, including the ability to delegate a limited taxing power. Moreover, the clause relates to the form of a State's government, not the content of particular legislative enactments by which a particular State's republican government creates, and delegates limited authority to, its own political subdivisions.

The taxing mechanism challenged by Petitioners was not a part of the State's "form of government," but was in fact contrary to it; and the State's form of government

was sufficient to protect itself, as it did in *Weaver* and the prompt legislative aftermath. The taxing mechanism was completely defunct as of June 10, 1998, without any prompting either from these plaintiffs/Petitioners or from the mechanisms of federal law. Rather, it was the State's own mechanisms of accountability for enforcing its own requirements regarding the proper make-up of taxing entities that eliminated the practice -- the very essence of a republican form of government at work and working well.

2. The original understanding of the Republican Guarantee Clause compels the decision reached by the South Carolina Supreme Court.

In a case relied upon by the plaintiffs/Petitioners in their brief to the South Carolina Supreme Court, the Kansas Supreme Court (quoting and paraphrasing James Madison in *Federalist Paper No. 39*, wrote:

> A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Madison says it is a "government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." [Emphasis added.]

VanSickle v. Shanahan, 511 P.2d 223, 243 (Kan.1973).

Elsewhere in *Federalist Paper No. 39*, Madison stated:

> It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly by the people . . . .

The Federalist, Jacob E. Cooke, ed. (Wesleyan University Press, 1961), No. 39, p. 251. [Emphasis added.]

Madison went on to point out how the constitutions of several states and the new federal Constitution all comported with that Republican Guarantee principle, even though (1) the chief magistrates of several states and the President of the new federal government were not elected by the people but were appointed by elected bodies, (2) judges in several states and in the new federal government were not directly elected but were appointed by elected bodies, and (3) members of the new Senate of the United States were not directly elected but were appointed by elected bodies. *Ibid.* at pp. 251–252.

Thus, governmental powers can, in full conformity with the Republican Guarantee Clause, be exercised by appointed officials in whose appointment the general public has only an indirect role. That is exactly the situation here.

The Petition claims as a reason for granting certiorari the South Carolina Supreme Court's "methodological mis-step" of not adequately considering

the original meaning of the Republican Guarantee Clause. Pet. at 22-24. But all of the material referred to above, as well as Chief Justice Marshall's discussion of the Founding Generation's understanding of the concept of representation in taxation (from *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), discussed below) were before the South Carolina Supreme Court in the briefs of the parties. Also before the South Carolina Supreme Court was the order of the trial court, whose handling of original intent issues quite acceptable. Pet. at 5. Petitioners do mention two particular sources that they feel are particularly informative (though without any discussion of why that might be). Those two sources are the 1628 Petition of Right and the Declaration of Rights of William and Mary, 1689, 2 W. & M., ch. 2, art. 4. Pet. at 23. The problem for Petitioners in urging that the South Carolina Supreme Court should have considered those materials is that the Petitioners never made that argument nor presented those materials to the courts below. Those sources have never been mentioned in this case prior to the Petition.

3. The precedent of this Court compels the decision reached by the South Carolina Supreme Court.

In *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 5 L.Ed.98 (1820), Chief Justice John Marshall, himself a veteran of the American Revolution that has been solemnly invoked by the Petitioners through much of the history of this case, spoke for a unanimous Court in holding that Congress had the power to tax residents of the District of Columbia despite their lack of representation.

Chief Justice Marshall also addressed the original understanding of the importance of the "taxation without

representation" concept to the Founding Generation. The historical animosity against "taxation without representation," relied upon by the Petitioners throughout this case, had nothing to do with limited delegations by elected public bodies to appointed local officials of taxing power for limited local public purposes. Instead, Marshall said, that historical animosity was directed against "requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings." 18 U.S. at 324. The difference between the British Stamp Act and tea taxes on the one hand and the creation of water and sewer districts by the South Carolina General Assembly on the other hand is, as the Supreme Court stated in *Loughborough*, "too obvious not to present itself to the minds of all." *Ibid.*

A century later, in *Heald v. District of Columbia*, 259 U.S. 114 (1922), the Court remained unanimous in an opinion by Justice Brandeis:

> Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. . . . . It is sufficient to say that the objection [to that practice] is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. [Emphasis added; citations omitted.]

Id., 259 U.S. at 124. *See also District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Parsons v. District of Columbia*, 170 U.S. 45, (1897); and *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000).

Thus, there is no generalized constitutional or other federal law prohibition against "taxation without representation." To sustain the position of the Petitioners one would have to be willing to assert that the federal government itself does not have a republican form of government. To make such an assertion would surely shock the Founding Generation, whose understanding is invoked by the Petitioners, and would be contrary to perhaps the most famous summary of the efforts of the Constitutional Convention that we have -- Benjamin Franklin's assertion, in response to Mrs. Powell's question as to the form of the new government: "A republic, madam, if you can keep it." WILLIAM MORROW, A REPUBLIC, IF YOU CAN KEEP IT: CONSTITUTIONAL POLITICS AND PUBLIC POLICY, pp. 1-2 (Prentice Hall, 2000).

4. The representation afforded to residents of the District by the Enabling Act was adequate to meet the representational requirements, if any, of the Republican Guarantee Clause.

If there is any representational requirement embodied in the Republican Guarantee Clause, it was satisfied by the taxing mechanism here at issue. The General Assembly had delegated a limited taxing power for a limited public purpose to a body whose members were all drawn from the limited locality and were all themselves subject to any taxes that they might impose. Each member of that body was appointed by the Governor (who is elected

by the people of South Carolina at large, including voters in the District), on the recommendation of the local legislative delegation (who are individually elected by voters in the local area, including voters in the District). The taxes were implemented by officials elected by voters in the County (including voters in the District). The General Assembly was kept apprised of the District's financial operations, including taxation issues. The General Assembly retained the right to amend or remove the taxing power held by special purpose district commissions, and in fact did so when it was determined that the mechanism violated a specific provision of the State constitution.

5. There is no contrary precedent.

Throughout this case, the Petitioners were not able to produce even a single case in which a court invalidated a state or local taxing mechanism as violative of the Republican Guarantee Clause, even though disgruntled taxpayers have had over two centuries to litigate the Republican Guarantee Clause.

The cases relied upon by Petitioners for their dicta do not advance the Petitioners' cause, but rather significantly undercut it.

VanSickle v. Shanahan, *supra*, concurs in Madison's Federalist Paper No. 39 discussion regarding the permissibility of indirect representation.

Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, 836 F.2d 986 (6th Cir. 1987) was a school desegregation case in which the federal district court had ordered a particular allocation of the

desegregation remedy's costs as between the state and its political subdivisions -- contrary to what the state legislature had determined as the appropriate allocation of such costs. The United States Court of Appeals for the Sixth Circuit condemned that interference with the local financial decisions of the elected state legislature of Tennessee by an unelected federal district judge, and discussed the history of "taxation without representation" in the context of reversing the lower court's unwarranted assumption of power over local finances.

Kelley in no way prohibits or even suggests prohibiting a state legislature from delegating to a political subdivision, through which the state exercises its police power related to water and sanitation, the ability to set the level of a limited property tax for funding those activities. Further, the case provides no basis for ordering the District to cause its existing sources of revenue -- current taxpayers and ratepayers -- to refund prior taxes to a small subset of those taxpayers. Indeed, *Kelley* strongly cautions against such judicial interference and in favor of the approach taken by the South Carolina Supreme Court in *Weaver* -- to allow the elected representatives of all the people of the State (including District taxpayers) to deal with this problem which affects a number of special purpose districts around the State. As stated by the court in *Kelley*, in language that highlights the similarity of this aspect of the two cases: "[W]e are talking about two political entities, a state and one of its political subdivisions, each of which has done wrong (as have subdivisions not now before us), and where the men and women representing the electorate of the state as a whole -- an electorate that includes the voters of all the subdivisions -- have chosen" how to handle the issue. *Kelley*, 836 F.2d at 998.

At best, *Kelley* is authority that the Republican Guarantee Clause *protects* the taxing prerogatives of state legislatures. There is nothing in *Kelley* to suggest that the Republican Guaranty Clause guarantees individuals the right to be free from taxes that are authorized and limited but not directly quantified by their elected representatives.

6. The South Carolina Supreme Court correctly declined to unscramble the eggs of prior years' financial results, since all residents were affected by the allegedly improper tax and those same residents would be the source of any refunds.

The South Carolina Supreme Court was altogether correct in declining to fashion an entirely novel federal cause of action in order to remedy an alleged wrong that it had already fully considered and adjudicated and that had already resulted in timely and effective corrective action by the General Assembly.

Essentially, the plaintiffs/Petitioners and their asserted class -- a small subset of all persons who paid the challenged property taxes to the District -- were asking that all the other taxpayers (who suffered the same alleged "wrong") be required to pay damages to the plaintiff class through their current taxes, fees, charges, and water and sewer rates; because, after all is said and done, those other taxpayers are the only source of funds that the District has.

Like the *Kelley* court, the South Carolina Supreme Court favored a legislative solution over a judicial solution in such matters of state and local tax and finance. The South Carolina General Assembly provided that solution and decided to make it prospective -- not attempting to

unscramble the eggs of past years' rates, charges, taxes and degrees of benefit provided. The plaintiffs/Petitioners sought to have the South Carolina Supreme Court ignore that legislative determination and undertake a judicial unscrambling of those eggs. The South Carolina Supreme Court quite properly declined that invitation.

CONCLUSION

For the reasons stated above, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpted Sections of **ACT NO. 596, 1969 S.C ACTS 1036,** styled "AN ACT TO CREATE HILTON HEAD NO. 1 PUBLIC SERVICE DISTRICT ON HILTON HEAD ISLAND IN BEAUFORT COUNTY; TO DEFINE ITS AREA; TO ESTABLISH A GOVERNING COMMISSION THEREFOR; TO PRESCRIBE THE FUNCTIONS AND POWERS OF THE DISTRICT AND OF ITS COMMISSION; TO MAKE PROVISION FOR THE BORROWINGS BY THE DISTRICT, INCLUDING THE ISSUANCE OF NOT EXCEEDING ONE MILLION FIVE HUNDRED THOUSAND DOLLARS OF GENERAL OBLIGATION BONDS OF THE DISTRICT; TO PRESCRIBE THE TERMS AND CONDITIONS UNDER WHICH MONEYS MAY BE BORROWED BY THE DISTRICT AND TO MAKE PROVISION FOR PAYMENT THEREOF"

SECTION 3. To be governed by a commission. Such district shall be operated, managed and governed by a commission to be known as "Hilton Head No. 1 Public Service District Commission." The commission shall consist of five residents of the district who shall be qualified electors of the district, such commissioners to be appointed by the Governor upon the recommendation of a majority of the Legislative Delegation of Beaufort County, including the Senators of the district. The original appointment shall be for a term of one year for two appointees, for two years for the third and fourth appointees and for three years for the fifth appointee, and in all cases those persons holding office shall continue to hold office until their successors have been appointed and quality. All of the terms shall begin as of the effective date of this act. Upon the termination of the term of office of any commissioner, a successor shall be appointed by the

Governor, upon the recommendation of a majority of the Legislative Delegation of Beaufort County, including the Senators of the district, for terms of three years. Any vacancy occurring in the office of commissioner by reason of death, resignation or otherwise, shall be filled for the remainder of the unexpired term by appointment by the Governor, upon the recommendation of a majority of the Legislative Delegation of Beaufort County, including the Senators of the district.

SECTION 4. Powers.--The commission shall be empowered as follows:

17. In addition to the taxes authorized by paragraph (e) of Section 5 [for repayment of bonds, the validity of which tax is not challenged by the Petitioners], the district may levy, annually, an ad valorem tax of not exceeding ten mills for corporate purposes. The commission shall annually notify the Beaufort County Auditor and the Beaufort County Treasurer of the tax levy millage to be assessed against the real and personal property in the district, whereupon such public officers of Beaufort County shall assess and collect the tax as requested and the treasurer shall hold the funds and disburse them as directed by the commission, including deposits to the commission's operating account as provided in paragraph 5 above. All such taxes shall constitute a lien upon the property against which they are levied, on a parity with the lien of county taxes, and the provisions of law relating to penalties for the nonpayment or tardy payment of county taxes, and the provisions relating to sale of property for delinquent county taxes shall apply to taxes levied pursuant to this act.

SECTION 8. Bids and audits.--The commission shall advertise for bids prior to letting contracts for the construction of any buildings or facilities, or purchase of equipment, involving an expenditure of more than one thousand dollars.

The financial affairs of the commission shall be subject to detailed audit by a firm of independent certified public accountants, with such audits to be made annually, and the audit reports thereof being promptly provided to the foreman of the Beaufort County Grand Jury, the Beaufort County Treasurer, each member of the Beaufort County Legislative Delegation, including the Senators of the district, and to any bondholder of the district requesting a copy of them. Any taxpayers of the district may obtain a copy of the reports on payment of the reasonable cost of reproducing a copy of such audit reports.